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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al., Appellants,*
v.
HARRISON SCHMITT, *et al., Appellees.*

No. 80-1067

FEDERAL ELECTION COMMISSION, *Appellant,*
v.
AMERICANS FOR CHANGE, *et al., Appellees.*

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF APPELLEES HARRISON H. SCHMITT, CARL T. CURTIS AND AMERICANS FOR CHANGE

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QUESTIONS PRESENTED

1. Whether 26 U.S.C. § 9012(f) prohibits only expenditures by political committees not authorized by any presidential candidate, which are made in cooperation, consultation or concert with or at the request or suggestion of a presidential candidate or the candidate's authorized political committees or their agents.

2. Whether 26 U.S.C. § 9012(f), if construed to prohibit political committees not authorized by any presidential candidate from making independent expenditures in excess of $1,000 to further the election of a publicly funded presidential candidate, violates the First Amendment guarantees of freedom of expression and association under *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

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STATEMENT OF THE CASE

A. Statutory Scheme

Presidential general election campaigns are governed by the complimentary provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-55 (1976 & Supp. III 1979) and the Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. §§ 9001-13 (1976 & Supp. III 1979).[1] FECA limits the amount that individuals and groups, including political committees, may contribute to candidates in any election for federal office. 2 U.S.C. § 441a (a)(1) - (3). FECA also limits the amount in a calendar year that individuals or groups may contribute to political committees not authorized by the candidate or established and maintained by a national political party. 2 U.S.C. § 441a(a)(1)(C). The total amount of expenditures that presidential candidates eligible for payments under the Fund Act may make are limited under FECA. 2 U.S.C. § 441a(b).

FECA requires political committees[2] to file statements of organization within 10 days of formation. 2 U.S.C. § 433(a). This statement provides information about the committee, including the type of committee, and whether it is affiliated with any other committee or authorized by any candidate. 2 U.S.C. § 433(b). Thereafter political committees must file pre- and post-election and quarterly reports with the Federal Election Commission ("FEC") regarding all contributions made and received and all

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[1] Except as otherwise noted, all citations relating to FECA will be to the current version and to 2 U.S.C. All citations to the Fund Act will be to the current version and to 26 U.S.C.

[2] *See* 2 U.S.C. § 431(4)(A) ("any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year"); 26 U.S.C. § 9002(9) ("any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office"); 11 C.F.R. § 9002.9 (1981); note 38 *infra*.

expenditures and disbursements. 2 U.S.C. § 434. For expenditures or contributions above $200, the identity of the source or recipient must also be reported. *Id.*[3]

The Fund Act provides for the public funding of general presidential election campaigns through the Presidential Election Campaign Fund ("Fund"), which is financed by a voluntary taxpayer check-off system. Presidential candidates of a political party who satisfy the requirements of 26 U.S.C. § 9003 can elect to receive payments from the Fund to defray campaign expenses incurred by the candidates or their authorized committees. 26 U.S.C. § 9004(c); *see* 26 U.S.C. § 9002(11) (definition of qualified campaign expense). Candidates who make such an election must agree not to incur aggregate expenses in excess of the public payment and not to accept private contributions to defray campaign expenses. 26 U.S.C. §§ 9002(4), 9003; *see* 2 U.S.C. § 441a(b) (expenditure limit). Individuals and groups are prohibited by FECA from making expenditures in coordination with the candidate, the candidate's authorized committees or their agents, since such expenditures are defined as contributions. 2 U.S.C. § 441a(a)(7)(B).The Fund Act has never defined "contribution" or "expenditure."

Section 9012(f) of the Fund Act, which the three-judge court found unconstitutional,[4] prohibits unauthorized political committees from making expenditures[5] in excess of $1,000 which would constitute qualified campaign expenses if incurred by an authorized committee of a presidential candidate. 26 U.S.C. § 9012(f). A political committee that violates § 9012(f) is subject to criminal penalties. 26 U.S.C. § 9012(f)(3).

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[3] FECA requires all solicitations and communications that expressly advocate the election or defeat of a clearly identified candidate by an unauthorized political committee to include a disclaimer, identifying the committee responsible for the solicitation or communication and stating that it was not authorized by any candidate. 2 U.S.C. § 441d.

[4] *See* FEC v. Americans for Change, Nos. 80-1609 & 80-1754, at 1a, 24a (D.D.C. Sept. 30, 1980)(three-judge court) [hereinafter cited as *FEC* v. *AFC* with page citations to Appendix to Jurisdictional Statement, Common Cause v. Schmitt].

[5] *See* 2 U.S.C. § 431(17); 11 C.F.R. § 109.1(a) (1981).

B. Facts of These Cases

Appellee Americans for Change ("AFC"), a political committee founded by 100 individuals, registered with the FEC on May 23, 1980, pursuant to 2 U.S.C. § 433.[6] Appellees Harrison H. Schmitt and Carl T. Curtis are the Chairman and Treasurer respectively of AFC. Appellees Americans for an Effective Presidency ("AEP") and Fund for a Conservative Majority ("FCM") are also political committees. *FEC* v. *AFC* at 3a.

During the 1980 presidential election campaign, AFC raised money by means of limited contributions from individuals and other political committees in accordance with FECA.[7] AFC made independent expenditures in support of Ronald Reagan and George Bush, the Republican candidates for President and Vice President. *Id.* at 3a-4a. AFC's independent expenditures included letters, fliers, buttons, bumper strips and newspaper and radio advertisements advocating Ronald Reagan's election and AFC's views on campaign issues.[8] AFC made no contributions to Ronald Reagan or any of his committees. AFC reported all receipts and disbursements in accordance with 2 U.S.C. § 434.[9]

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[6] Because it registered on May 23, 1980, AFC did not qualify as a "multicandidate committee" until after the November 1980 election. *See* 2 U.S.C. § 441a(a)(4). AFC is an independent committee. It is neither "affiliated" with any other committee nor "connected" with any other organization. *See* 11 C.F.R. § 100.5(g) (1981) (definition of "affiliated committee"); 2 U.S.C. § 431(7) (definition of "connected organization").

[7] 2 U.S.C. § 441a. This provision bars AFC from accepting a contribution in excess of $5,000 from any source in a calendar year.

[8] *See* Exhibits to Jurisdictional Statement, Common Cause v. Schmitt, at 2b-9b. See Appendices A & B *infra* for examples of radio and newspaper advertisements purchased by AFC.

[9] The FEC's "Data Compiled From the Public Records of The Federal Election Commission" ("FEC Data"), by the FEC's own admission, may contain errors. FEC Data, at II (FEC admission). Moreover, the FEC's data contains information pertaining to parties, including separate segregated funds established by corporations, unions or trade associations, not before this Court and not at issue herein. The data does not advise the Court of the individual expenditures made by AFC, or contributions received by AFC. *See* note 31 *infra*.

C. The Proceedings Below

On July 1, 1980 Common Cause, David Cohen and Winifred Long (hereinafter collectively referred to as "Common Cause") sued AFC seeking an order declaring that AFC violated 26 U.S.C. § 9012(f) and enjoining Schmitt, Curtis and AFC from making expenditures in support of Ronald Reagan's candidacy.[10]

On July 15, 1980 the FEC moved to intervene in the Common Cause action and filed a separate complaint against AFC and two other political committees, AEP and FCM. The FEC complaint sought a declaration that § 9012(f) prohibited expenditures, including independent expenditures, in excess of $1,000 by unauthorized political committees in support of a publicly funded presidential candidate. Common Cause moved to intervene as party plaintiff in the FEC action and to consolidate both cases.[11]

The FEC and AFC moved to dismiss the Common Cause action on the ground that the three-judge court lacked subject matter jurisdiction. AFC and the FEC opposed Common Cause's motion to intervene in the FEC action.

AFC, along with AEP and FCM, moved for summary judgment in the FEC action. AFC argued that § 9012(f) should be construed to permit independent expenditures but to prohibit political committees from making expenditures requested or authorized by the candidate or the candidate's committees. Alternatively, AFC, along with AEP and FCM, argued that § 9012(f) is facially unconstitutional under the First Amendment.

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[10] Count I of Common Cause's complaint alleged that AFC's activities, even if independent of the official Reagan campaign, violated § 9012(f). Count II alleged that AFC was not independent of the official Reagan campaign and, as a result, its expenditures were contributions to the official Reagan campaign in violation of the Fund Act. Common Cause did not appeal the judgment of the three-judge court that it lacked subject matter jurisdiction over Count II. Jurisdictional Statement, Common Cause v. Schmitt, at 10 n.15. Following the three-judge court's dismissal of Count II, Common Cause reasserted its claims in an administrative complaint filed with the FEC pursuant to 2 U.S.C. § 437g. That complaint is still pending.

[11] Common Cause amended its complaint to add AEP and FCM as defendants.

On August 28, 1980 the three-judge court granted judgment for appellees in the FEC action, dismissed Count I of Common Cause's amended complaint on the basis of the ruling in the FEC action and dismissed Count II for lack of subject matter jurisdiction. The FEC's motion for summary judgment was denied.

The opinion of the court was issued on September 30, 1980. The court held that § 9012(f) is unconstitutional on its face under the First Amendment and the decisions of this Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (*per curiam*) and *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980). *See FEC* v. *AFC* at 14a-24a.

SUMMARY OF ARGUMENT

I.A. Section 9012(f) applies to unauthorized committees and limits to $1,000 "expenditures to further the election of" a publicly funded candidate. The FEC has promulgated regulations that define expenditures that "further" an election as expenditures that are within the candidate's control or that have been authorized or requested by the candidate. 11 C.F.R. § 9002.11(b)(1), (2) (1981). Accordingly, § 9012(f) does not limit expenditures that have been made independently of any candidate.

B. 1. A construction that § 9012(f) does not limit independent expenditures by unauthorized committees is supported by the legislative history of the Fund Act and FECA. Prior to considering the Fund Act and § 9012(f), the Senate addressed limits on independent expenditures by passing FECA. Title I of FECA effectively prohibited any independent expenditure for "media communications" and required independent groups to obtain the candidate's permission prior to making an expenditure. Title I was held unconstitutional. *ACLU* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats* v. *ACLU*, 422 U.S. 1030 (1975). Title I was repealed and replaced by 18 U.S.C. § 608(e), which limited all independent expenditures to $1,000. Section 608(e) was held unconstitutional in *Buckley* v. *Valeo*, 424 U.S. 1, 51 (1976). Congress has always addressed limits on independent spending for political expression through FECA, not the Fund Act.

2. The legislative history of the Fund Act demonstrates that § 9012(f) is designed to limit contributions that result from coordinated expenditures and not independent expenditures. The Fund Act's sponsor, Senator Pastore, made clear that § 9012(f) was not intended to apply to groups organized as committees and acting independently of any candidate. Senator Pastore noted that Congress, in enacting § 9012(f), did "nothing to impinge freedom of speech and freedom of activity. So long as the candidate knows nothing about it and there is no subterfuge about it, the people are entitled to act as they will." 117 Cong. Rec. 42626 (1971) (remarks of Sen. Pastore).

3. Until this case, the FEC utilized § 9012(f) in its regulations to support limits on coordinated expenditures, not independent expenditures. All FEC regulations must be submitted to each house of Congress and are subject to a legislative veto. *See* 26 U.S.C. § 9009(c); 2 U.S.C. § 438(d). All FEC regulations that were based on § 9012(f) and promulgated after public hearings addressed coordinated spending and were not vetoed by either house. 11 C.F.R. § 146.1 (1980) (repealed 1980); *id.* § 110.7(b)(5) (1979) (repealed 1980). The FEC, like Congress, did not construe § 9012(f) as a limit on independent expenditures.

II.A.1. If construed to limit independent expenditures by political committees, § 9012(f) unconstitutionally infringes freedom of expression and association. *Buckley* recognized that expression and association are entitled to receive maximum First Amendment protection. 424 U.S. at 14-23.

2. If construed to limit independent expenditures by political committees, § 9012(f) is no different than the expenditure limitation struck down by *Buckley* as an impermissible infringement on freedoms of expression and association. Since "virtually every means of communicating ideas in today's mass society requires the expenditure of money," *id.* at 19, expenditure limitations such as § 9012(f) impermissibly restrain the quantity of political expression in election campaigns. Section 9012(f) restricts "the number of issues discussed, the depth of their exploration and the size of the audience reached during a presidential campaign." *Id.*

Buckley's holding that the quantity of expression by "independent associations" may not be limited under the First Amendment, *id.* at 22, establishes that the quantity of such speech by political committees in presidential campaigns may not be constitutionally restricted. The inherent worth of political expression in exposing the public to "uninhibited, robust and wide-open" debate is not altered by the nature of the speaker, whether it is a wealthy individual, an informal small group or a political committee. *FEC* v. *AFC* at 23a (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)); *accord, First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785 (1978). Independent expenditures, including those by political committees, in publicly funded presidential campaigns "are permitted without limit" since "limitations on uncoordinated expenditures were held unconstitutional in *Buckley* v. *Valeo*." *Republican National Committee, supra*, 487 F. Supp. at 286.

3. An expenditure limitation such as § 9012(f) impermissibly interferes with the quality of political expression achieved through group association. *Buckley, supra*, 424 U.S. at 22. This associational right "is diluted if it does not include the right to pool money through contributions for funds are often essential if 'advocacy' is to be truly or optimally effective." *Id.* at 65-66. Section 9012(f), as a restraint on "the ability of independent associations . . . to expend resources on political expression," simultaneously interferes with " 'the freedom of [their] adherents.' " *Id.* at 22-23 (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250-51 (1957)). As an independent political committee, AFC is a group of individuals who have joined together to engage in effective political expression. The "pooled" contributions permit AFC to communicate its views more effectively by purchasing time on radio and space in newspapers, and hiring professionals to prepare, package and place its advertisements. As construed by appellants, § 9012(f) impermissibly restrains effective political expression by AFC.

4. Section 9012(f) is an expenditure limitation and infringes the freedoms of expression and association far more severely than the limits on contributions upheld in *Buckley*. Contribution limitations restrict the freedom of contributors to voice the inten-

sity of their support for the candidate, but permit undifferentiated "symbolic expression of support" without infringing the contributor's freedom to speak independently of the candidate or to become a member of any political organization. *Buckley, supra*, 424 U.S. at 22-23. In contrast, § 9012(f) is a direct and substantial restraint on AFC's political expression. The term "political committee" as defined by the federal election laws and interpreted by the FEC encompasses any independent group that undertakes political activities in support of a presidential candidate. 26 U.S.C. § 9002(a); 2 U.S.C. § 431(4); 11 C.F.R. §§ 9002.9, 100.5 (1981). As construed by the court below, § 9012(f) prohibits all groups — large or small, formal or informal — from effectively communicating views that support a publicly funded presidential candidate. *See Buckley, supra*, 424 U.S. at 22-23; *California Medical Association* v. *Federal Election Commission*, 49 U.S.L.W. 4842, 4846 (U.S. June 26, 1981) (No. 79-1952) (plurality opinion of Marshall, J.).

B. To be constitutionally permissible, § 9012(f) must (1) serve a compelling governmental interest; (2) do so narrowly; and (3) constitute the legislative alternative least restrictive of First Amendment rights. *See Buckley, supra*, 424 U.S. at 45-51; *Bellotti, supra*, 435 U.S. at 786; *FEC* v. *AFC* at 10a-13a. *Buckley* held that a limitation on independent expenditures such as § 9012(f) cannot satisfy this "exacting scrutiny" and is unconstitutional. 424 U.S. at 44.

1. In *Buckley* this Court held that the only governmental interest sufficiently compelling to support restrictions on First Amendment rights is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions" on candidates. *Id.* at 25. The Court concluded that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders," *id.* at 26-27, the government has a compelling interest in prohibiting the practice. The Court held that the "appearance of corruption" inherent in the act of making a campaign contribution to a candidate is a compelling reason to limit the size of all such contributions. *Id.* at 27-29.

2. *Buckley* held that "the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify . . . [a] ceiling on independent expenditures." *Id.* at 45. By definition, an "independent expenditure" is made in the absence of any prior consultation or other prearrangement with a candidate or the candidate's campaign. *FEC* v. *AFC* at 6a; *see* 2 U.S.C. § 441a(a)(7)(B)(i). Absent prearrangement between citizen and candidate, there can be no corruption because the lack of prior consultation with the candidate or the candidate's campaign "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate" and eliminates even the appearance that a corrupt agreement has been struck. *Buckley, supra*, 424 U.S. at 47. Contrary to the view of democracy espoused by appellants, no problem of corruption is created when a political committee (or any person) earns some measure of loyalty from a candidate because it effectively advocates the candidate's election. Any resulting loyalty constitutes no more than salutary responsiveness to a political constituency — the core of our system of representative government.

3. *Buckley* held that a limitation on independent expenditures such as § 9012(f) is unnecessary to prevent the reality or appearance of corruption because alternative measures less restrictive of First Amendment rights fully serve that governmental interest. *Id.* at 55. Even without limitations on independent expenditures, FECA and the Fund Act contain a comprehensive set of (1) prohibitions and limitations on contributions, *see* 26 U.S.C. § 9003(b); 2 U.S.C. § 441a(a)(1)(C); (2) regulation of "coordinated" expenditures, *see id.* § 441a(a)(7)(B)(i); and (3) disclosure requirements, *see id.* §§ 433-34, that prevent the opportunity for corrupt *quid pro quo* arrangements. Under this existing statutory framework, a limitation on independent expenditures is unconstitutional because " '[i]n the area of First Amendment freedoms, government has the duty to confine itself to *the least* intrusive regulations which are adequate for the purpose.' " *Buckley, supra*, 424 U.S. at 238 (opinion of Burger, C.J.) (quoting *Lamont* v. *Postmaster General*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring)).

ARGUMENT

I. SECTION 9012(f) DOES NOT LIMIT EXPENDITURES THAT ARE MADE WITHOUT THE REQUEST OR AUTHORIZATION OF A PUBLICLY FUNDED PRESIDENTIAL CANDIDATE.

A. Properly Construed 26 U.S.C. § 9012(f) Limits Only Expenditures That Have Been Requested Or Authorized By A Candidate, Not Independent Expenditures.

"[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

The proper reading of 26 U.S.C. § 9012(f) in relation to other provisions of the Fund Act, FECA and FEC regulations restricts its application to expenditures, authorized or requested by a presidential candidate, that are made by unauthorized political committees.[12] Section 9012(f)(1) provides, in pertinent part, that:

> [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur *expenditures to further the election of such candidates*, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates in an aggregate amount exceeding $1,000.

26 U.S.C. §9012(f)(1) (emphasis added). Violation of § 9012(f)(1) constitutes a criminal act punishable by fines and imprisonment. 26 U.S.C. § 9012(f)(3). Section 9012(f)(1) does not limit independent expenditures in support of a candidate.[13] So construed,

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[12] The Fund Act does not define "unauthorized committee." The FEC, however, has specified that "[a]n 'unauthorized committee' is a political committee which has not been authorized in writing by a candidate to solicit or receive contributions or make expenditures on behalf of such candidate." 11 C.F.R. § 100.5(f)(2) (1981). All political committees subject to federal campaign financing laws are either "authorized" or "unauthorized." *Id.* AFC is an unauthorized committee.

[13] An independent expenditure is:

§ 9012(f) preserves the constitutional right of individuals and associations to make independent expenditures in support of a candidate.

The scope of § 9012(f)(1) must be based on a determination of what constitutes "expenditures to further the election" of a candidate.[14] Neither FECA nor the Fund Act defines this phrase. However, its meaning is discernible from statutory and regulatory provisions that use and narrowly construe this term.

A "qualified campaign expense" means an expense incurred by eligible candidates[15] or their authorized committees[16] "to further the election" of such candidates. 26 U.S.C. § 9002(11). The FEC defines an expenditure that "furthers" the election of eligible candidates as follows:

> An expenditure is made *to further* a Presidential or Vice Presidential candidate's campaign if it is incurred by or *on behalf of* such candidate or his or her authorized committee.

11 C.F.R. § 9002.11(b)(1) (1981) (emphasis added).

> an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

2 U.S.C. § 431(17); *see* 11 C.F.R. § 109.1(a)(1981). Virtually every word in this definition is a term of art. *See* 2 U.S.C. § 431(2), (6), (9), (11), (18) (definitions of "candidate," "authorized committee," "expenditure," "person," and "clearly identified," respectively); 11 C.F.R. § 109.1(b)(2), (4), (5) (1981) (definitions of "expressly advocating," "made with the cooperation," and "agent," respectively).

[14] By its terms, § 9012(f)(1) limits unauthorized committees from incurring "expenditures to further the election of" presidential candidates.

[15] *See* 26 U.S.C. § 9002(4) (defining eligible candidates); 11 C.F.R. § 9002.4 (1981) (same).

[16] *See* 26 U.S.C. § 9002(1) (defining authorized committees); 11 C.F.R. § 9002.1(a)(1981) (same).

FECA and FEC regulations implementing both FECA and the Fund Act define when an expenditure is "on behalf of" an eligible candidate:

> [A]n expenditure is made on behalf of a candidate . . . , if it is made by
>
> (i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or
>
> (ii) any person *authorized or requested* by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

2 U.S.C. § 441a(b)(2)(B) (emphasis added); 11 C.F.R. §§ 110.8(g)(1)-(2), 9002.11(b)(2) (1981).

It follows that an "expenditure to further the election of such candidates" is an expenditure made "on behalf of" the candidates. Under FECA and FEC regulations, an expenditure by an unauthorized political committee is "on behalf of" a presidential candidate *only if* the expenditure has been "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate."

In the court below, Common Cause argued that this construction would render "unnecessary" the proviso in § 9012(f) concerning expenditures that "would constitute qualified campaign expenses if incurred by an authorized committee of [the] candidate[ ]." *FEC* v. *AFC* at 7a. Common Cause asserted that even in the absence of § 9012(f), the Fund Act would treat coordinated expenditures as "qualified campaign expenses." Common Cause overlooked the fact that an authorized committee is a political committee that has been authorized by the candidate *in writing* "to incur expenses to further the election of" the candidate. 26 U.S.C. § 9002(1). Expenditures incurred by an authorized committee are *a priori* "authorized" or coordinated, and therefore are qualified campaign expenses. In the case of unauthorized committees such written authorization does not exist. Consequently there was a necessity to restrict those activities of an unauthorized committee which were tantamount to contributions, *i.e.*, coordinated expenditures. This need was satisfied through § 9012(f).

Common Cause also argued against AFC's construction because FECA specifically includes within the definition of "contribution" any "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate." 2 U.S.C. § 441a(a)(7)(B)(i); *FEC* v. *AFC* at 7a. Common Cause argued that § 441a(a)(7)(B)(i) renders § 9012(f) redundant if the latter provision is construed to limit only coordinated expenditures. However, § 441a(a)(7)(B)(i) did not exist at the time § 9012(f) was enacted.[17] Between 1971, the time of enactment of the Fund Act, and 1974 neither § 441a(a)(7)(B)(i) nor any predecessor was in effect. There was no need for such a provision during that time. Until 1974 there were no generally applicable limits on contributions to federal candidates.[18] Only the Fund Act barred publicly funded candidates and their authorized committees from accepting any private contribution.

In this historical context, § 9012(f) must be construed as a contribution limit. It imposes criminal sanctions on unauthorized political committees that make expenditures on behalf of a candidate after coordinating their efforts with the candidate or the candidate's representatives. All parties concede in these cases that appellees, including AFC, have not coordinated their expen-

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[17] The current version of § 441a(a)(7)(B)(i) was enacted in 1976, five years after the Fund Act. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 488. A prior version was enacted in 1974. 18 U.S.C. § 608(c)(2)(B) (repealed 1976); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263.

[18] *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263. In 1971 Congress anticipated that there could be insufficient monies in the Fund to finance totally the campaigns of all candidates who qualified under the Fund Act. 117 Cong. Rec. 42622 (1971) (remarks of Sen. Mathias). Congress accordingly provided that in the event of a deficiency in the Fund, *see* 26 U.S.C. § 9006(c), candidates would be able to receive private contributions, *id.* §§ 9003(b)(2), 9012(b)(1). Prior to 1974, there were no generally applicable limits on contributions to candidates. Section 9012(f) nevertheless limits to $1,000 the amount that an unauthorized committee could contribute to an eligible candidate in the event of a deficiency in the Fund.

ditures with any eligible candidate. *See* note 10 *supra*; note 61 *infra*. Section 9012(f) does not apply to appellees.

B. The Legislative History Of 26 U.S.C. § 9012(f), The Fund Act And FECA Demonstrate That Congress Did Not Intend 26 U.S.C. § 9012(f) To Limit Independent Expenditures.

Appellants argue that § 9012(f) is an integral portion of the Fund Act, which is designed to curtail expenditures by political committees that are independent of any candidate. Brief of Appellant FEC at 19-20; Brief of Appellant Common Cause at 26. Appellants cite no legislative history that reflects a congressional intent to limit the independent activities of unauthorized political committees such as appellees. The legislative history of the Fund Act and concurrent as well as subsequent campaign financing legislation demonstrates that Congress did not intend to apply § 9012(f) to independent expenditures.

1. As enacted in 1971, Title I of FECA, not 26 U.S.C. § 9012(f), curbed independent expenditures by individuals and political committees.

Section 9012(f) should be construed by examining its relationship with other campaign financing laws in effect or under consideration by Congress *in 1971,* the year of its enactment. Viewed in this cross-light, it is apparent that Congress chose a vehicle other than § 9012(f) or the Fund Act as a means of limiting independent political speech. That other vehicle was Title I of the original FECA. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, Title I, 86 Stat. 3-8 (1972).

Title I imposed a limit on all campaigns for federal office with respect to the amount that could be spent for the use of "communications media," including broadcasting stations, newspapers, magazines, outdoor advertising facilities and telephones. *Id.* § 102, 86 Stat. 3. The limitation was enforced by requiring broadcast licensees and other vendors of "communications media" to obtain written certification from the candidate on whose behalf any person wished to purchase advertising. *Id.* § 104, 86 Stat. 6. The candidate had to certify that the advertising

expense would not exceed the applicable expenditure limit. *Id.* The effect of this licensing scheme was accurately described by Senator Hart:

> No one can place an advertisement specifically endorsing my candidacy unless I sign off on it. So people cannot campaign independently for me as much as they want. Indeed, under existing law, by refusing to sign off, I can prevent them from campaigning at all, at least with regard to advertisements in the media covered by the Act. And even if I do not choose to prevent their advertisements on my behalf, if I have already used my full allotment of media expenditures, I cannot sign off and they cannot have the ad accepted by the station or newspaper.

119 Cong. Rec. 26315 (1973).

FECA, including Title I, was considered and passed by the Senate *three months before* Senate consideration and passage of the Fund Act. *See* 117 Cong. Rec. 30077 (1971). At the time the Fund Act was introduced, its sponsor, Senator Pastore, described its relationship to the previously passed FECA, which had been designated S. 382:

> [Under the Fund Act] a presidential candidate has the discretion of deciding whether he will accept public financing or finance his campaign privately. If he elects to accept public financing, he is limited in his expenditure to the extent provided in the [Fund Act]. If he elects to finance his campaign privately the limitations contained herein for publicly financed campaigns would not apply. However, the limitations contained in the legislation that passed the Senate on August 5 — S. 382 — the Federal Election Campaign Act of 1971 would apply.

Id. at 41762.

By the operation of Title I of FECA, *all* candidates whether privately or publicly financed were subject to limits on expenditures for "communications media." Publicly financed presidential candidates were subject to an additional overall limitation. Under either funding system, Title I required advertisers to obtain written certification from a candidate before selling advertising time or space. This certification was originally required because Congress wanted candidates to control *all* media expenditures on their behalf, even those that otherwise would be

independent of the campaign. *Id.* If the original Fund Act and FECA had been in effect for the 1980 presidential campaign, appellees would not have been able to make *any* media expenditures unless a broadcaster or other advertiser had first obtained Ronald Reagan's written certification that the Title I media expenditure limit would not be exceeded. Under this original statutory scheme there could be no independent expenditures since Title I of FECA required that all expenditures be approved in advance by the candidate.

During the debate on the Fund Act, Senator Pastore was confronted with questions concerning independent political activity. He cited FECA, not § 9012(f), as the vehicle that controlled independent spending. Specifically, he was asked by Senator Goldwater:

> [W]hat is there to stop me from supporting the candidate of my choice, by forming a committee without his knowledge, without his having any way of knowing about my committee, and, under my constitutional rights and the constitutional rights of those associated with me, to spend that money, to buy television advertising that he knows nothing about, to buy radio advertising — and use it — which he knows nothing about, to spend it in any way I see fit?
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> * * *
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> . . . Suppose [a candidate's] brother buys some time on television and the candidate says, "I did not know my brother was spending money that way." There is no way we can prevent that.

Senator Pastore replied:

> That is covered by S. 382 [FECA]. I keep repeating that. What we are trying to do is to characterize this particular bill [the Fund Act] as complimentary legislation on campaign expenditures and campaign financing. This is the financing part.
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> * * *
>
> On the proposition the Senator is talking about, *we took care of that three months ago when we passed [FECA].*

Id. at 41953 (emphasis added). FECA, not the Fund Act, addresses limits on independent expenditures.

The ten-year history of campaign financing legislation demonstrates that Congress has consistently addressed indepen-

dent expenditures through FECA. A three-judge court subsequently held that Title I violated the First Amendment. *ACLU* v. *Jennings,* 366 F. Supp. 1041, 1051 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats* v. *ACLU,* 422 U.S. 1030 (1975). In response, Congress revised its approach to independent expenditures by enacting a $1,000 limit on all independent expenditures. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1265; *see* S. Rep. No. 689, 93d Cong. 2d Sess. 18-19 (1974), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 114-15 (1977). This provision, former § 608(e) of the Criminal Code, was also declared unconstitutional in *Buckley* v. *Valeo,* 424 U.S. 1, 51 (1976).

Congressional attempts to limit independent political activity were never contingent on a public funding system. As Congress stated:

> While independent expenditures pose a difficult question, it should be emphasized that *the need to control them does not arise from public financing.* Whether campaigns are funded privately or publicly such controls are imperative if Congress is to enact meaningful limits on direct contributions.

S. Rep. No. 689, 93d Cong., 2d Sess. 18 (1974), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 114 (1977) (emphasis in original).

Since *Buckley,* Congress has repeatedly acknowledged that the First Amendment forbids it from legislating dollar limits on expenditures for independent political speech. The legislative history of the 1976 Amendments to FECA is replete with statements revealing legislators' understanding that *Buckley* bars any such expenditure limits on individuals or groups.[19] Congress

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[19] 122 Cong. Rec. 7186 (1976) (remarks of Sen. Buckley) ("the practical consensus of [the *Buckley*] decision is that we are going to see more and more well-organized, well-financed groups operating outside of an individual campaign, parallel to it, but independently"); *id.* at 7187 (remarks of Sen. Kennedy) (*Buckley's* rejection of limits on "independent spending" created need for legislation concerning disclosure and requirement that such spending be "genuinely independent"); *id.* (remarks of Sen. Cannon)(a total ban on con-

interpreted *Buckley* as forbidding limits on independent expenditures by political committees even with respect to publicly financed candidates. Senator Cannon, chairman of the Senate Committee on Rules and Administration and floor manager of the 1976 amendments to FECA, noted during hearings:

> Of course, under the Court's decision [in *Buckley*] if we went to the public financing aspect, then we could get back to the limitation on expenditures, but it would go only by the candidate itself and still would not apply to the independent person or to the committee.

Federal Election Campaign Act Amendments of 1976: Hearings on S. 2911, S. 2911 — Amendment No. 1396, S. 2912, S. 2918, S. 2953, S. 2980 and S. 2987 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 94th Cong., 2d Sess. 177 (1976), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1976, at 183 (1977). The Senate floor manager believed that an expenditure limit "would not apply to the independent person or to the committee" that made expenditures on behalf of a publicly financed candidate.

In lieu of limits on independent expenditures by committees, Congress chose for the first time to limit the amount that an individual may contribute to an independent committee, 2 U.S.C. § 441a(a)(1)(C), and the amount that a committee may contribute to

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tributions by political committees to candidates would still leave committees free to "make their own independent expenditures"); *id.* at 8882 (remarks of Rep. Gaydos)(with respect to "independent expenditures, the Supreme Court has limited the manner of regulating Federal elections"); *id.* at 12199 (remarks of Rep. Hays)(*Buckley* held that a limit on independent expenditures "impermissibly intruded on the right of individuals and groups to use their resources to state their own views on political matters"); H. Rep. No. 917, 94th Cong., 2d Sess. 5 (1976), *reprinted in* Legislative History of the Federal Election Campaign Act Amendments of 1976, at 805 (1977)(In response to *Buckley,* Congress legislated "full reporting and disclosure by individuals and groups that make 'independent expenditures' " but simultaneously safeguarded "the full enjoyment of the First Amendment right of individuals and groups to make expenditures for political expression.")

another committee, *id.* § 441a(a)(2)(C). *See* 122 Cong. Rec. 6692-93 (1976) (remarks of Sen. Cannon). In addition, increased disclosure requirements were imposed on political committees that make independent expenditures, 2 U.S.C. § 434(b)(13) (1976) (amended 1979), and specific disclaimers of candidate authorization were required on independent political advertising that expressly advocates the election or defeat of a clearly identified candidate, *id.* § 441d.

Notwithstanding these specific congressional responses to *Buckley vis a vis* independent expenditures, the legislative history of the 1976 amendments, which included amendments to the Fund Act, does not contain a single reference to § 9012(f). There is no suggestion that independent expenditures could be limited, or were ever intended to be limited, under § 9012(f).

The legislative history of the Fund Act establishes that Title I of FECA and subsequently § 608(e), not § 9012(f), were the vehicles chosen by Congress to limit independent expenditures. Once those limits were held unconstitutional in *ACLU* v. *Jennings* and *Buckley,* Congress believed it was powerless to limit independent expenditures.

2. The legislative history of the Fund Act demonstrates that 26 U.S.C. § 9012(f) was not intended to limit independent expenditures by political committees.

As originally enacted FECA reflected an unambiguous congressional intent to limit independent expenditures for media communications. There is no corresponding legislative history with respect to the Fund Act or § 9012(f). To the contrary, the legislative history reflects a congressional intent that § 9012(f) operate as a limit on direct contributions by an unauthorized committee as well as a limit on expenditures that are tantamount to contributions, *i.e.,* coordinated expenditures.

Section 9012(f) was part of the Fund Act as introduced by Senator Pastore. *See* 117 Cong. Rec. 41758-61 (1971). The original version of § 9012(f)(1) read as follows:

> It shall be unlawful for any political committee which is not an authorized committee with respect to the eligible can-

> didates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, *or to make contributions to such candidates or any of their authorized committees to be used directly or indirectly, to defray qualified campaign expenses,* in an aggregate amount exceeding $1,000.

Id. at 41761 (emphasis added). The italicized language remained in § 9012(f) until the Conference Committee deleted it without explanation. Throughout Senate debate on the Fund Act, § 9012(f) expressly referred both to a limitation on *expenditures* "to further the election of such candidates which would constitute qualified campaign expenses if incurred by an authorized committee" and to a limitation on *contributions* to candidates "to be used, directly or indirectly, to defray qualified campaign expenses." When read together, these provisions reveal a congressional concern that publicly funded candidates for president not defray campaign expenses either by accepting private contributions or by accepting the virtually identical benefit of expenditures by unauthorized committees. The common thread between contributions and coordinated expenditures is that they both come within the control of the candidate or the candidate's agents. Congress wished to prevent candidates from circumventing the expenditure limit by requesting unauthorized committees to incur campaign expenses.

Remarks by legislators, particularly Senator Pastore, reflect congressional concern with contributions to candidates and not with independent activity. Senator Pastore categorically stated that:

> [W]e do nothing to impinge freedom of speech and freedom of activity. So long as the candidate knows nothing about it and there is no subterfuge about it, the people are entitled to act as they will.

Id. at 42626.

Suggestions that § 9012(f) would apply to independent spending were rejected. In conjunction with an amendment offered by Senator Taft, Senator Pastore discussed enlarging the scope of § 9012(f) to include independent activity and expanding the types of

organizations subject to its limit. The debate demonstrates Senator Pastore's refusal to make § 9012(f) applicable to independent activity:

> Mr. PASTORE. [L]et us assume that a group on a campus, say faculty members, got together and formed a committee. Does the Senator mean to tell me they would have to get the permission of the candidate to be authorized to make a statement in his support? Do we not get into freedom of speech here?
>
> Mr. TAFT. I do not believe freedom of speech would apply except to an individual.
>
> Mr. PASTORE. I am talking about a committee, a committee of faculty members say at Columbia University who might get together and buy radio time for $1,000 to broadcast their support. Would they have to get the permission of the candidate?
>
> Mr. TAFT. I suggest if the amount put on as a limitation of expenditures, as an attempt to put an overall limit on expenditures in presidential campaigns is included, if this is to have meaning, it has to have that.
>
> Mr. PASTORE. There is a distinction. Usually a political committee is formed for the purpose of directly aiding that candidate and there is no question about being authorized by that candidate. We wrote something to that effect in the other bill [FECA]. How far are we going to go without obligating independent organizations and committees furthering the promotion of a particular candidate on their own?
>
> I know what the Senator is trying to accomplish but I am wondering on this amendment whether or not we may be opening Pandora's box. There is no question about what the Senator said.

Id. at 42398. In explaining his opposition to limits on independent activities, Senator Pastore stated:

> . . . I do not want to begin to strait-jacket organizations that have a legal right, because of the character of their constitution, to proceed to express their personal opinion without permission from or obligation to the candidate they favor. I do not feel that they should have to get his permission or be subject to a fine. That is getting into pretty dangerous territory.
>
> I do not want any outsider to make a *contribution* — I do not care what the organization is — unless the person comes under it. But this goes a step further. The reason why it was

> put in the law was to recognize the fact that somewhere along the line are certain parties who have no direct contact with the candidate, but only because they like his view on issues they want to support him. They do not want to get permission to be authorized, because they are independent in that respect. On the other hand, they do not want to subject themselves to a fine.

Id. at 42399 (emphasis added). Senator Pastore further objected to any attempt to apply § 9012(f) to:

> . . . an independent, unauthorized committee that functions on its own, without any contact with the candidate himself — because the candidate has not become a party to the transaction because otherwise indirectly it is authorized — but any group acting on its own. I gave the example of the college campus group that gets together on behalf of a Republican or a Democratic candidate and they publish a pamphlet urging the candidacy of Mr. Nixon, say, at a cost of $1,500. The question is, Are they subject to a $5,000 fine? I asked that question, and the Senator from Ohio said "Yes."
>
> That is what bothers me. That is what bothers me.

Id. at 42401. Senator Pastore declared that:

> . . . anyone is entitled to think as he likes and to say what he thinks. He is not authorized by the candidate to do so. He gets together a committee because they think it is to their advantage, whether school teachers, COPE, or some other group. And they issue an article that costs $1,500. The candidate does not know what it is about. He never heard of the article, much less read it. Under this law [the Taft Amendment] this group would be subject to a $5,000 fine. It is hard for me to buy. It is close to the line.
>
> I repeat that there is a lot of substance in what the Senator is saying. However, we are dealing in a very sensitive area. I will tell the Senator, frankly, that I do not have the perfect answer.

Id.

At the conclusion of this debate, the Senate rejected the Taft Amendment. *Id.* at 42402.[20] The author of § 9012(f) had repeated

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[20] Section 9012(f) was amended during initial consideration by the Senate to apply to individuals. *See* 117 Cong. Rec. 42626 (1971). The debate on that amendment, offered by Senator Miller, indicates an intent to control only contributions by prohibiting "an individual [from] throwing his $100,000 into a campaign kitty for

opportunities to prescribe unambiguously that section's application to independent committees, but refused to do so on each such occasion. Under § 9012(f) political committees of "school teachers, COPE, or some other group," *id.* at 42401, are "entitled to act as they will" provided "the candidate knows nothing about it and there is no subterfuge," *id.* at 42626. AFC, Schmitt and Curtis are no less entitled to participate in independent expenditures than are school teachers, Columbia University faculty members, COPE or any other group.[21]

President or Vice President." *Id.* (remarks of Sen. Miller). There was no mention of prohibiting independent political activity by individuals. In the Conference Committee the reference to "individual" in § 9012(f) was deleted. H. Conf. Rep. No. 708, 92d Cong., 1st Sess., *reprinted in* [1971] *U.S. Code Cong. & Ad. News* 2078.

[21] In suggesting that this case be remanded for further discovery, Common Cause is attempting to have the district court find legislative facts, precipitated by allegedly new political developments, to support a novel construction of the statute. Congress did not contemplate such facts when it enacted § 9012(f) and never intended the provision to apply to independent expenditures by political committees such as AFC. The federal judiciary is not the proper forum to make legislative findings to support the constitutionality of a statutory provision that Congress itself believed regulated entirely different activities. If Congress perceives the existence of a new problem involving independent campaign expenditures, it can propose legislation, hold hearings, and fully debate the provisions before enacting it into law. It has not done so and Common Cause is not entitled to transfer that process wholesale to the federal judiciary.

A litigant whose activities are regulated under such a statute can challenge its constitutionality. In that context alone would a litigant be entitled to discovery to demonstrate that Congress had not provided a compelling governmental interest to support regulation of constitutionally protected activity, or a rational basis to support economic regulation. *See* Polk Co. v. Glover, 305 U.S. 5 (1938) (*per curiam*); Borden's Farm Prod. Co. v. Baldwin, 293 U.S. 194 (1934).

3. The FEC historically has construed 26 U.S.C. § 9012(f) to limit coordinated expenditures, not independent expenditures.

This case is the first time that the FEC has asserted that § 9012(f) limits independent expenditures by political committees. Despite numerous hearings and requests for comments on regulations governing independent expenditures and the Fund Act during the FEC's six years of existence, the FEC conspicuously failed to promulgate any rule limiting such independent expenditures.[22] While the FEC has specifically prohibited independent expenditures by certain committees, national banks, corporations and labor organizations, the FEC never limited independent expenditures by unauthorized political committees in support of presidential candidates. *See* 11 C.F.R. §§ 109.1(b)(1), (e) & 110.7(a)(5), (b)(4) (1981).

In 1976 the FEC proposed a regulation that largely tracked the language of § 9012(f). *See* 41 Fed. Reg. 26,399 (1976). On July 7, 1976 the FEC conducted extensive hearings at which time § 9012(f) and the proposed regulation were the principal topics of discussion. *See Hearings on Part 140 (General Election Financing) Before the Federal Election Commission* (July 7, 1976). On that occasion, two Commissioners and the FEC General Counsel volunteered that the statute could not be applied to independent expenditures by political committees in light of *Buckley*. *Id.* at 21-22, 36-40 (remarks of Commissioner Thomas E. Harris, and colloquy between Commissioner William Springer and FEC General Counsel John G. Murphy, respectively).

None of the witnesses or Commissioners suggested that § 9012(f) should be construed to limit independent expenditures. To

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[22] *See Hearings on Part 109 (Independent Expenditures) and Part 110 (Contribution and Expenditure Limitations and Prohibitions) Before the Federal Election Commission* (June 9, 1976); *Hearings on Part 140 (General Election Financing) Before the Federal Election Commission* (July 7, 1976); *Hearings on Proposed Rules on Public Financing of Presidential Election Campaigns Before the Federal Election Commission* (June 20, 1978); 41 Fed. Reg. 21,572 (1976); 42 Fed. Reg. 55,622 (1977); 43 Fed. Reg. 23,587 (1978); 45 Fed. Reg. 32,003 (1980); *id.* at 43,371.

the contrary, discussion focused on whether the "right" to make *coordinated* expenditures up to the $1,000 limit should be extended to local and county political committees of the two major parties. *See id.* at 23-56 (remarks of General Counsel of Republican National Committee); *id.* at 72-78, 84-93 (remarks of General Counsel and Deputy General Counsel of Jimmy Carter for President Committee); *id.* at 122-23 (remarks of Counsel of Democratic National Committee).

As a result of this hearing, the FEC replaced the proposed regulation with a provision that dealt exclusively with limits on coordinated expenditures by political party committees in connection with a presidential general election. 11 C.F.R. § 146.1 (1980) (repealed 1980). In addition, § 9012(f) was the basis used by the FEC to permit coordinated expenditures by local party committees up to $1,000 on behalf of the presidential ticket.[23]

Rather than utilizing § 9012(f) as a limitation on independent expenditures, the FEC used that statute as justification for permitting *coordinated* expenditures up to $1,000 by party committees. The FEC regulations based on § 9012(f), which by statute must be submitted to each house of Congress subject to a legislative veto prior to promulgation, *see* 2 U.S.C. § 438(d); 26 U.S.C. § 9009(c), amply demonstrate that the FEC, like Congress, did not construe or intend that § 9012(f) limit independent expenditures. *See Lorillard* v. *Pons,* 434 U.S. 575, 580-81 (1978); *Chemehuevi Tribe of Indians* v. *Federal Power Commission,* 420 U.S. 395, 408-10 (1975); *Commissioner of Internal Revenue* v. *Noel's Estate,* 380 U.S. 678, 681-82 (1965).

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[23] *See* 11 C.F.R. § 110.7(b)(5)(1979) (repealed 1980). "This provision is derived from 26 U.S.C. § 9012(f)." H.R. Doc. No. 573, 94th Cong., 2d Sess. 68 (1976) (FEC "Justification and Explanation" for § 110.7(b)(5)), *reprinted in* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 864, at 1561-3 (1980). The most recent FEC regulations omit § 110.7(b)(5), because the 1979 amendments to the election laws now enable local party committees to make certain unlimited coordinated expenditures on behalf of their presidential nominee in connection with voter registration and get-out-the-vote activity and certain campaign materials. *See* 2 U.S.C. § 431(9)(B)(iv), (viii), (ix).

II. IF CONSTRUED TO LIMIT INDEPENDENT EXPENDITURES, 26 U.S.C. § 9012(f) IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

A. *Buckley* Held That Limits On Independent Expenditures Such As 26 U.S.C. § 9012(f) Violate The First Amendment.

The three-judge court construed § 9012(f) to prohibit independent expenditures over $1,000 by political committees. So construed, the three-judge court properly found § 9012(f) facially unconstitutional.

1. Limits on independent expenditures restrain freedom of political expression and association.

Limitations on independent expenditures infringe freedoms of expression and association that are afforded maximum protection by the First Amendment. *Buckley, supra,* 424 U.S. at 14-15. *Buckley* recognized that " 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates.' " *Id.* at 14 (quoting *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966)); *Bellotti, supra,* 435 U.S. at 776-77. By giving the broadest protection to political expression, the First Amendment nurtures a republic where the people are sovereign. "[T]he ability of the citizenry to make informed choices among candidates" who will upon election inevitably "shape the course which we follow as a nation" is "essential." *Buckley, supra,* 424 U.S. at 14-15.[24] Freedom of speech has its " 'most urgent application precisely to the conduct of campaigns for political office.' " *Id.* at 15 (quoting *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971)).

Freedom of association receives no less First Amendment protection than freedom of expression. Group association enhances effective advocacy of public and private points of view, particularly controversial ones. *Buckley, supra,* 424 U.S. at 15.

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[24] *Accord,* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government").

The Court in *Buckley* acknowledged that the First Amendment guarantees " 'freedom to associate with others for the common advancement of political beliefs and ideas.' " *Id.* (quoting *Kusper* v. *Pontikes,* 414 U.S. 51, 56 (1973)). Such freedom encompasses the freedom to associate with the political party or organization of one's choice. *Buckley, supra,* 424 U.S. at 15.[25] *Buckley* establishes that the First Amendment gives maximum protection to a political committee that advocates its views on candidates and campaign issues.

2. Limits on independent expenditures impermissibly restrict the quantity of political expression.

The three-judge court found that § 9012(f) makes it a crime for independent political committees to spend in excess of $1,000 for communications in support of presidential candidates who receive public funding. *FEC* v. *AFC* at 27a. So construed, § 9012(f) differs little from the expenditure limitation of former 18 U.S.C. § 608(e)(1), which *Buckley* found could not withstand strict First Amendment scrutiny. Section 608(e)(1) made it a crime for individuals or groups to make expenditures in excess of $1,000 "relative to a clearly identified candidate." *Buckley, supra,* 424 U.S. at 39. Section 9012(f) imposes the same restriction on expenditures by independent political committees relative to presidential candidates.

Buckley found that a limitation on the amount that "a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." *Id.* at 19. "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.* The Court recognized that the increasing importance of television, radio and other mass media for news and information make these expensive modes of communication indispensable to effective political speech. *Id.*[26]

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[25] *See* Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975).

[26] For example, in 1975 one full-page advertisement in a daily metropolitan newspaper cost $6,971.04. Buckley, *supra,* 424 U.S.

The $1,000 ceiling of § 9012(f) prevents political committees, including AFC, from communicating their viewpoints to the public.[27] During the 1980 presidential campaign, AFC spent in excess of $1,000 to purchase advertisements, which advocated the election of Ronald Reagan and expressed AFC's views on campaign issues, in major metropolitan newspapers and on radio stations around the country. *See* Appendices A & B *infra*. AFC also published and distributed letters, brochures, fliers, buttons and bumper strips in support of Ronald Reagan.

Prohibiting activities such as AFC's reduces the quantity of political expression during a presidential campaign by "restricting the number of issues discussed, the depth of their exploration and the size of the audience reached." *Buckley, supra*, 424 U.S. at 19. Restraints on the quantity of political expression, including that which advocates the election or defeat of presidential candidates, violate the First Amendment. *Id.* at 47-51 (citing *Mills, supra*, 384 U.S. at 218-20; *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 257 (1974)).

In *Mills* the Court struck down as an unconstitutional restraint on political expression a state law making it a crime for editors of a daily newspaper to publish an editorial on election day urging people to vote for a particular candidate. 384 U.S. at 220. *Tornillo* declared unconstitutional a law that required a newspaper to make space available to candidates to reply to its criticism. 418 U.S. at 258. In *Buckley* the Court found expenditure limitations to be a much more severe restraint on expression. 424 U.S. at 47-51. Section 9012(f) prohibits political committees from engaging in independent expression throughout a presidential campaign and restricts the overall quantity of

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at 20 n.20. If anything, today these modes of communication are even more indispensable and even more expensive. *See* Editor & Publisher, Sept. 1, 1979, at 12N (full page advertisement in *Washington Post* cost $13,626.90 in 1979).

[27] As did § 608(e)(1), § 9012(f) makes it a criminal offense for an association to place a single quarter-page advertisement relative to a publicly funded presidential candidate in a major metropolitan newspaper. Buckley, *supra*, 424 U.S. at 40.

political expression. The unconstitutional restraints of *Mills* and *Tornillo* pale in comparison. [28]

Limitations on the quantity of political expression are no less unconstitutional when the speaker is a political committee. *FEC* v. *AFC* at 24a. *Buckley* found unconstitutional " 'substantial and direct restrictions on the ability of candidates, citizens *and associations* to engage in protected political expression.' " *Id.* at 21a (quoting *Buckley, supra,* 424 U.S. at 58-59) (emphasis supplied by court). This Court has subsequently made clear that the First Amendment protects not only the speaker but also "public access to discussion, debate, and the dissemination of information and ideas." *Bellotti, supra,* 435 U.S. at 783. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, *association,* union or individual." *Id.* at 777 (emphasis added). Accordingly, the First Amendment prohibits the government from "dictating subjects about which persons may speak *and the speakers* who may address a public issue." *Id.* at 785 (citing *Police Department* v. *Mosley,* 408 U.S. 92, 96 (1972)) (emphasis added).

That AFC is well-organized does not distinguish its political expression from that of any other individual, group, or association. *FEC* v. *AFC* at 17a. Whether a wealthy individual, an informal small group or a political committee pays for a public communication, the expression is of equal inherent worth and exposes the public to debate on public issues that is " 'uninhibited, robust and wide open.' " *Id.* at 23a (quoting *New York Times Co.,*

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[28] Section 9012(f) is analogous to Title I of FECA which was held unconstitutional as a prior restraint. *See* ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom.* Staats v. ACLU, 422 U.S. 1030 (1975). By providing public funds to the candidate, the government can proscribe independent communications concerning the candidate by political committees. Moreover, the candidate, by choosing to accept public funds, can effectively silence all independent communications by political committees in support of the candidate.

supra, 376 U.S. at 270). [29] Section 9012(f) as construed by appellants impermissibly restricts the quantity of AFC's political expression on the basis of the speaker's identity.

The fact that § 9012(f) is part of a public financing scheme does not save it from constitutional infirmity under *Buckley*. *See Republican National Committee, supra,* 487 F. Supp. at 286; *FEC* v. *AFC* at 14a-15a. In *Republican National Committee,* this Court reviewed the constitutionality of the Fund Act's prohibition of contributions to publicly funded candidates. This prohibition is constitutional only because it in no way abrogates the right independently to express support for the candidate. 487 F. Supp. at 285-87. *Republican National Committee* found it "[m]ost important" that "uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in *Buckley* v. *Valeo.*" *Id.* at 286. The candidate's choice to fund the campaign with public money does not alter the First Amendment right of the candidate's supporters, be they individuals, groups or political committees, to make unlimited independent expenditures.

3. Limits on independent expenditures impermissibly restrict the quality of political expression.

An independent expenditure limitation is also unconstitutional under *Buckley* as an impermissible interference with the *quality* of political expression. *Buckley, supra,* 424 U.S. at 22.

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[29] *See* United States v. Congress of Indus. Organizations, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring):

> There is therefore an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance, whether an individual or a group, of the advantage of free and full discussion and of the right of free assembly for that purpose.
>
> The most complete exercise of those rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function.

Buckley recognized the interrelation of speech and association, particularly in the political context. *Id.* at 15-17. Emphasizing the importance of association to the advancement of political beliefs and ideas, *Buckley* relied on a long line of cases establishing an individual's First Amendment right to effective political expression through effective political organization. *Id.* at 15.[30] This associational right "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally effective." *Id.* at 65-66.

Buckley held that § 608(e)(1), which limited independent expenditures by individuals or groups, precluded "most associations" from amplifying the voice of their adherents, the original basis for First Amendment protection for the freedom of association. *Id.* at 22. Restraints on "the ability of independent associations . . . to expend resources on political expression" simultaneously interferes with " 'the freedom of [their] adherents.' " *Id.* at 23 (quoting *Sweezy, supra,* 354 U.S. at 250).

Section 9012(f), like § 608(e)(1), impermissibly restrains the quality of AFC's political expression. AFC is a "pooling agent" for many small contributors who wish to engage in effective political advocacy. *FEC* v. *AFC* at 15a.[31] The money contributed purchased "political communications" that "speak the language" of AFC's contributors, since the contributions are bas-

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[30] *See, e.g.,* Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); NAACP v. Alabama, 357 U.S. 449, 460-63 (1958); Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957); Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975); *accord,* Griswold v. Connecticut, 381 U.S. 479, 483 (1965); Democratic Party v. La Follette, 49 U.S.L.W. 4178, 4182-83 (U.S. Feb. 25, 1981) (No. 79-1631).

[31] The majority of the individual contributions received by AFC were less than $200. The FEC's assertion that AFC did not represent small contributors because its contributions averaged $750 is disingenuous. First, $750 is well below the $5,000 contribution limit that Congress deemed appropriate. *See* 2 U.S.C. § 441a(a)(1)(C). Second, the FEC's "average" is computed using only those contributions that AFC itemized in its reports. Only contributions in excess of $200 must be itemized. *Id.* § 434(b)(3). The FEC's "average" ignores all unitemized contributions of less than $200.

ed on a shared political understanding and political interest. *Id.* at 15a-18a.[32]

With the increasing dependence of the electorate on mass media for information and news, *see Buckley, supra,* 424 U.S. at 19, formally structured organizations that use professional services in preparing and disseminating political messages are essential to effective political expression by all but the very wealthy. *FEC* v. *AFC* at 17a - 19a. Most individuals and many small groups could not afford such expenditures because of the high cost of time or space in widely circulated or viewed media. *See* note 26 *supra.* Political committees like AFC, which was organized by 100 individuals, by necessity require central management to organize and focus the views of their many participants. The effect of the message depends not only on the size of the audience reached, but also on the manner in which the message is communicated.[33] The use of professionals by political committees and individuals to prepare, package and place communications enhances the effectiveness of the message. *FEC* v. *AFC* at 16a-19a. Economies of scale available to large centrally managed committees further enhance the effectiveness of speech. *Id.* at 16a.[34] Due to the high cost and expertise required for effective political expression, denial of the right to join together in large centrally managed groups for the purpose of expressing views on presidential candidates would silence those individuals without wealth and media expertise.[35]

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[32] Many of AFC's requests for contributions included examples of the advertisement AFC had already purchased or hoped to purchase with the contributions. *See* Appendix C *infra.*

[33] *See* Cohen v. California, 403 U.S. 15, 25-26 (1971); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 514 (1969).

[34] As the three-judge court recognized, 1000 politically motivated persons could each probably afford to purchase one classified advertisement in a major newspaper, but by joining together, pooling funds and integrating planning and preparation, they could purchase an advertisement in a national magazine or on television. FEC v. AFC at 16a.

[35] Since $1,000 would not even purchase a quarter-page advertisement in a major newspaper, § 9012(f) negates the associational ad-

4. Under *Buckley*, 26 U.S.C. § 9012(f) constitutes a limitation on expenditures, not contributions.

Section 9012(f) impinges on the constitutional freedoms of association and expression far more severely than the contribution limitations upheld in *Buckley*. The contribution provisions before the Court in *Buckley* limited the amount of money that individuals or groups could give to candidates and their authorized campaign committees. *See* 424 U.S. at 23-24. Section 9012(f) does not limit contributions to or fundraising by political committees, but limits the amount that an unauthorized political committee may spend independently of the candidate or his campaign.

Buckley found that limits on contributions to a candidate restrict the freedom of contributors to voice the intensity of their support for the candidate through the size of their contributions, but permit undifferentiated "symbolic expression of support" without infringing "the contributors' freedom to discuss candidates and issues." *Id.* at 22.[36] Contribution limitations infringe a supporter's freedom to associate with the candidate, but "leave the contributor free to become a member of any political association." *Id.* at 22-23; *accord, California Medical Association, supra,* 49 U.S.L.W. at 4846 (plurality opinion of Marshall, J.).

AFC is an independent political committee, a group of individuals who have joined together in order to amplify their views.

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vantage of pooling funds. As such, § 9012(f) goes beyond "chilling" the decision to associate that arises from disclosure requirements, Buckley, *supra,* 424 U.S. at 66-67, and directly restrains not only the quantity of associational speech, but the quality of speech attained through group association.

[36] *Buckley* found no indication that candidate and campaign contribution limits would have an adverse effect on campaign funding. 424 U.S. at 21-23. At most the candidate would be forced to raise funds from a broader base of constituents, but there would be no reduction in the total amount of money available to promote political expression. *Id.* Section 9012(f) is not nearly so benign. By preventing the pooling of resources to purchase effective advocacy, it discourages spending for independent political expression and severely restricts the amount available for political debate in presidential campaigns.

Section 9012(f) constitutes more than a marginal interference with AFC's ability to express support for a candidate. It is a direct and substantial restraint on the ability of AFC to engage in effective political expression. *Id.*; *FEC* v. *AFC* at 19a - 24a.[37] AFC's expenditures, which were made independently of President Reagan and his campaign, are precisely the "type of expenditures that the court in *Buckley* considered constitutionally protected." *California Medical Association, supra,* 49 U.S.L.W. at 4846 (plurality opinion of Marshall, J.); *accord, id.* at 4848 (Blackmun, J., concurring in judgment).

As defined by the federal election laws and applied by the FEC, the term political committee encompasses *any* group that undertakes political activities in support of a presidential candidate.[38] As construed by the three-judge court, § 9012(f) pro-

[37] *See* T. Emerson, The System of Freedom of Expression 432 (1970):

> [I]t is clear from the functions served by association in a democratic society that associational expression should be entitled to the same complete protection as individual expression. Organization primarily supplies the mechanism for reaching a wider audience. It does not change the character of expression as the communication of beliefs, opinions, information and ideas, or its content. Thus associational expression is simply an extension of the individual right of expression and, for the same reasons and to the same extent, should be free of governmental abridgment.

[38] The FEC has unequivocally stated that "for the purposes of 26 U.S.C. 9012(f), the term 'political committee,' " is "*any* committee, *club, association* or other *group* of persons which receives contributions . . . *or makes expenditures* aggregating in excess of $1,000 during a calendar year." 11 C.F.R. § 9002.9 (1981) (referring to 11 C.F.R. § 100.5 (1981)) (emphasis added). The FEC has never promulgated a regulation or issued an advisory opinion that permits individuals to act in concert to influence an election and spend over $1,000 without becoming a "political committee."

Common Cause argues that § 9012(f) "imposes no restriction on the freedom of two or more individuals, pooling and using their own money, to engage jointly in personal expression to support their preferred candidate." Brief of Appellant Common Cause, at 35; *accord,* Brief of Appellant FEC, at 45 n.66. The FEC, however,

hibits any form of association for the purpose of expressing political views in support of a presidential candidate. Notwithstanding the broad scope of the statute, appellants argue that it is no more restrictive than the contribution limitations in *Buckley* because it prohibits only "centrally managed mass funds" but leaves everyone free to spend without limits for "personal speech." Brief of Appellant Common Cause, at 20-21; *see* Brief of Appellant FEC, at 41-50. For all practical purposes, appellants argue that First Amendment protection is forfeited when political expression becomes effective. The First Amendment protects both the *quantity* and *quality* of political expression.[39] These rights may not be denied to "groupings of like-minded individuals" merely because they are "efficient." *FEC* v. *AFC* at 16a.

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has always maintained that such a group would constitute a "political committee" whenever it raises contributions or makes expenditures in excess of $1,000 "for the purpose of influencing an election." FEC Advisory Opinion 1980-106, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5582 (Dec. 23, 1980) (a "loose association" that publishes a summary of positions by candidates Reagan, Carter and Anderson concerning "Key Moral and Religious Liberty Issues" is a political committee if more that $1,000 is spent for publication and distribution); FEC Advisory Opinion 1980-126, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577 (Dec. 22, 1980)(a single individual who solicited contributions and used them to print and distribute pamphlets urging people to vote for Republicans was acting as a "political commitee"); FEC Advisory Opinion 1976-51, Fec. Elec. Camp. Fin. Guide (CCH) ¶ 5215 (Sept. 2, 1976) (an informal discussion group of individuals who do not pool funds but make personal contributions to candidates are a political committee because they are "acting in concert").

[39] The First Amendment rights of speech and assembly are not ends in themselves, but "means to effect change through the political process." Ripon Soc'y v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir.) (*en banc*), *cert. denied*, 424 U.S. 933 (1976). The First Amendment protects the right not only to form political associations, "but to organize and direct them in the way that will make them most effective." *Id.* The right to associate is meaningless if an organization is prohibited from effectively advocating the political change sought by its adherents. *Id.*; *accord*, Buckley, *supra*, 424 U.S. at 22-23; Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

B. *Buckley* Held That Limits On Independent Expenditures Such As 26 U.S.C. § 9012(f) Fail To Serve Narrowly Any Compelling Governmental Interest That Cannot Be Accommodated By Alternative Measures Less Restrictive Of First Amendment Rights.

A limitation on independent expenditures such as § 9012(f) is a direct restraint on political expression and association protected by the First Amendment. To be constitutionally permissible, § 9012(f) must: (1) serve a compelling governmental interest; (2) do so narrowly; and (3) constitute the legislative alternative least restrictive of First Amendment rights. *See Buckley, supra,* 424 U.S. at 45-51; *Bellotti, supra,* 435 U.S. at 786; *FEC* v. *AFC* at 10a-13a. *Buckley* held that a limitation on independent expenditures such as § 9012(f) cannot satisfy this "exacting scrutiny" and is unconstitutional. 424 U.S. at 44-45; *California Medical Association, supra,* 49 U.S.L.W. at 4848 (Blackmun, J., concurring in judgment); *FEC* v. *AFC* at 10a-13a.

1. The only governmental interest sufficiently compelling to justify restrictions on political expression and association during an election campaign is the prevention of corruption or the appearance of corruption.

In *Buckley,* this Court held that the only governmental interest sufficiently compelling to support restrictions on First Amendment rights of political expression and association is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25; *see California Medical Association, supra,* 49 U.S.L.W. at 4846 (plurality opinion of Marshall,J.); *FEC* v. *AFC* at 11a.[40] *Buckley* recognized that the 1974

[40] *Buckley* held that contributions and expenditures during election campaigns may not be limited in order "to mute the voices of affluent persons and groups in the election process" or to "act as a brake on the skyrocketing cost of political campaigns." 424 U.S. at 25-26. The Court concluded that both asserted governmental interests are inconsistent with the First Amendment. *See id.* at 48-49

amendments to FECA were designed to prevent the corrupt use of campaign contributions in return for candidate promises. *Buckley, supra,* 424 U.S. at 27; *accord, California Medical Association, supra,* 49 U.S.L.W. at 4846-47 (plurality opinion of Marshall, J.). The Court noted that Congress was reacting to specific abuses that surfaced in the aftermath of the 1972 presidential election: (1) contributions to candidates by the dairy industry in exchange for increases in governmentally imposed milk price supports ; (2) contributions to candidates by large corporations following threats of unfavorable governmental treatment made by campaign fundraisers; and (3) contributions to candidates by ambassadors and would-be ambassadors as a condition of their appointments.[41] As the court of appeals in *Buckley* found, "[t]he record before Congress was replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions." *Buckley* v. *Valeo,* 519 F.2d 821, 839 n.37 (D.C. Cir. 1975) *(en banc), rev'd in part,* 424 U.S. 1 (1976). This Court concurred in Congress's conclusion that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the in-

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("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *id.* at 49 n.55 ("Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.")

The FEC asserts that the opinion below "disregards" § 9012(f)'s alleged function of preventing " 'splintered parties and unrestrained factionalism [that might] do significant damage to the fabric of government.' " Brief of Appellant FEC, at 38 (quoting Storer v. Brown, 415 U.S. 724, 736 (1974)). The FEC does not specify how independent expenditures on behalf of the Republican and Democratic Party nominees for President, the only expenditures realistically limited under § 9012(f), will lead to the development of "splintered parties and unrestrained factionalism."

[41] The Court pointed to the instances of corruption noted by the court of appeals. Buckley, *supra,* 424 U.S. at 27 & n.28 (citing Buckley v. Valeo, 519 F.2d 821, 839-40 nn. 36-38 (D.C. Cir. 1975) (*en banc*)).

tegrity of our system of representative democracy is undermined." *Buckley, supra,* 424 U.S. at 26-27[42]

Buckley noted that not all campaign contributions are accompanied by explicit or even tacit agreement that a successful candidate will bestow special favor upon the contributor. *Id.* at 26-27. The Court recognized that the abuses of the 1972 campaign had seriously impaired the citizen's confidence in government, leaving a skeptical public with the fear that many, if not all, large contributions are the result of an illicit *quid pro quo* arrangement between contributor and candidate. *Id.* at 27. The "appearance of corruption" inherent in the act of making a campaign contribution to a candidate, the Court held, is a compelling reason to limit the size of all contributions to candidates. *Id.* at 27-29.

2. Limits on independent expenditures such as 26 U.S.C. § 9012(f) fail to serve narrowly the compelling governmental interest in stemming real or apparent corruption.

A contribution limitation is narrowly drawn and "focuses precisely on the problem of large campaign contributors -- the narrow aspect of political association where the actuality and potential for corruption have been identified." *Id.* at 28. It constitutes the alternative least restrictive of First Amendment rights since neither disclosure requirements nor federal bribery and gratuity laws[43] have proved an effective deterrent of the corrupt exchange of money for governmental action, *id.* at 27-28, and

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[42] *Accord,* FEC v. AFC at 11a; California Medical Ass'n v. FEC, 641 F.2d 619, 645 (9th Cir. 1980) (Wallace, J., concurring and dissenting), *aff'd,* 49 U.S.L.W. 4842 (U.S. June 26, 1981) (No. 79-1952) ("The expression which Congress hoped to curb by the contribution regulations is, roughly: 'Here is $100,000. Now I have your vote in my pocket.' ")

[43] *See* 18 U.S.C. §§ 201(c), (g) (1976). Agreements prohibited by the bribery and gratuity statutes are the precise *quid pro quo* arrangements that undergird FECA. Note, *Campaign Contributions and Federal Bribery Law,* 92 Harv. L. Rev. 451, 458 (1978); *see, e.g.,* United States v. Brewster, 506 F.2d 62, 77-78 (D.C. Cir. 1974) ("Senator Brewster received sums of money from Anderson, not out of general support based on his past record or insubstantial

contribution limitations do not impede the ability of individuals or groups to engage in unlimited expression during an election campaign, *id.* at 28-29; *accord, Republican National Committee, supra,* 487 F. Supp. at 286; *FEC* v. *AFC* at 12a-13a.

In contrast to its recognition of a compelling need to eliminate "the corrupting potential of large financial contributions to candidates," *Buckley, supra,* 424 U.S. at 36, *Buckley* held that "the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify . . . [a] ceiling on independent expenditures," *id.* at 45. Nevertheless, appellants assert that independent expenditures by political committees such as AFC are "corrupt" because a candidate may become "beholden" to a group that independently advocates the candidate's election. *See* Brief of Appellant FEC, at 23-27; Brief of Appellant Common Cause, at 27-29. Yet, by definition, an "independent expenditure" is made in the absence of any prior consultation or other prearrangement with a candidate or the candidate's campaign. *FEC* v. *AFC* at 6a; *see* 2 U.S.C. § 441a(a)(7)(B)(i). As Senator Pastore made clear when FECA and the Fund Act were first enacted, Congress intended to prevent the situation in which "one makes a personal contribution to an individual [and] there is the intimate contact of the person to [the] person. That is where we are disturbed a little, because *that is where you become beholden.*"[44]

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hopes for the future, but in well-founded consideration for his forthcoming official action on specific proposed or pending postal rate legislation.")

[44] 117 Cong. Rec. 29303 (1971) (remarks of Sen. Pastore) (emphasis added). The legislative history of § 9012(f) indicates that Congress intended it to serve as a contribution limitation. *See* Part I *supra.* The evil that Congress sought to eradicate arose solely in the context of contributions to candidates in exchange for special treatment. *See, e.g., id.* at 41774 (remarks of Sen. Long concerning Fund Act)("I have seen people make commitments that they did not want to make and start out determined that they were not going to make any and find themselves head over heels in debt and making commitments they had no intention of making."); *id.* at 42595 (remarks of Sen. Cannon concerning Fund Act) ("Take France, as an example. The present ambassador contributed $54,000 in 1968. I am sure his name just happened to be taken from a hat.")

Absent prearrangement between citizen and candidate, there is no opportunity for the latter to agree, either expressly or tacitly, to perform an official act in exchange for the concededly independent expenditure. *See FEC* v. *AFC* at 19a. Likewise, there can be no "appearance of corruption," because the lack of prior consultation with the candidate or his campaign "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate" and eliminates even the appearance that a corrupt agreement has been struck. *Buckley, supra,* 424 U.S. at 47.[43]

An independent expenditure poses no threat of real or apparent corruption. *Id.* at 47; *California Medical Association, supra,* 49 U.S.L.W. at 4848 (Blackmun, J., concurring in judgment); *FEC* v. *AFC* at 12a. *Buckley* rejected the claim that a limitation on independent expenditures is necessary to prevent circumvention of the contribution ceilings by those who would covertly enter illegal agreements with candidates and disguise the resultant expenditures on the candidate's behalf as "indepen-

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[43] *See* Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments,* 86 Yale L.J. 953, 964 (1977) ("The lack of a visible associational link vitiates the appearance of corruption.")

Buckley pointed out that "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." 424 U.S. at 47. There is considerable evidence that this has often been the case. *See* Wash. Post, Apr. 28, 1981, at A3, col. 3 (Republican National Committee Chairman asserts independent expenditures "create all kinds of mischief"); Wash. Post, June 29, 1980, at A6, col. 1 (Reagan campaign chairman expresses "fear" that independent expenditures are "unguided missiles" and often "backfire in your face"); Wash. Star, June 12, 1980, at A3, col. 2 (Reagan campaign official suggests that independent expenditure committees are " 'loose cannons' " that cause candidates "more trouble than help").

Rather than securing the certainty of special treatment from the candidate in consideration for a large contribution, the person or group making independent expenditures runs the risk that the expenditures will instead earn the candidate's disfavor.

dent." *Id.* at 44-45; *FEC* v. *AFC* at 11a.[46] A "loophole closing" provision such as § 9012(f) is broadly overinclusive. It brings within its sweep legitimate independent expenditures that cannot be "disguised" contributions because of the absence of prior consultation with the candidate or the candidate's campaign and therefore can raise no appearance of corruption.[47]

If a "disguised" contribution were possible, a limitation on independent expenditures such as § 9012(f) would be underinclusive, since it does not reach the numerous situations in which contribution limitations might similarly be circumvented. Section 9012(f) does not apply to wealthy individuals, any of whom could "lawfully dedicate his entire fortune" in exchange for special treatment by a candidate. *FEC* v. *AFC* at 22a. As construed by appellants, § 9012(f) does not apply to independent expenditures by "informal" groups, even though such groups are capable of evading contribution limitations as well.[48] Assuming § 9012(f) is construed narrowly to apply only to expenditures that

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[46] AFC can make only *independent* expenditures with respect to publicly funded presidential elections. *See* 26 U.S.C. §§ 9003(b)(2); 9012(b). AFC was prohibited from making *any* contributions to publicly funded presidential candidates, *see* 26 U.S.C. § 9003(b)(2); 2 U.S.C. § 441a(a)(1) (limiting contributions to federal candidates other than publicly funded presidential candidates by all "persons," including political committees that are not "multicandidate" committees, to $1,000 per year). AFC's contributors cannot evade the Fund Act's prohibition of direct contributions to presidential candidates by "channelling funds" through AFC. *See* California Medical Ass'n, *supra*, 49 U.S.L.W. at 4847 (plurality opinion of Marshall, J.).

[47] *See* Buckley, *supra*, 424 U.S. at 44 (independent expenditure limitations "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations"); Note, *supra* note 45, at 972 n.97.

[48] *See* note 38 *supra*.

expressly advocate a candidate's election or defeat,[49] it will not apply to independent expenditures discussing "issues" that do not explicitly mention the candidate, no matter how closely they track the candidate's platform.[50] As *Buckley* concluded, "no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office." 424 U.S. at 45.[51]

Section 9012(f), like the independent expenditure limitation struck down in *Buckley,* is unconstitutional because it is not narrowly tailored to serve the compelling governmental interest in stemming real or apparent corruption. That § 9012(f) is contained in the Fund Act rather than in FECA does not alter this result. The

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[49] *Buckley* held that "to preserve the provision against invalidation on vagueness grounds, § 608(e)(1)," which on its face limited all expenditures "for the purpose of influencing" an election, "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate." 424 U.S. at 44; *accord,* FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 52-53 (2d Cir. 1980)(*en banc*); United States v. National Comm. for Impeachment, 469 F.2d 1135, 1141 (2d Cir. 1972); FEC v. AFSCME, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9078 (D.D.C. 1979). Absent such a limiting construction, § 9012(f) suffers from similar unconstitutional vagueness.

[50] If the Court were to construe § 9012(f) as it construed § 608(e), the full-page AFC advertisement reprinted in Appendix A *infra* would not violate § 9012(f) if the words of express advocacy were deleted. *See* Buckley, *supra,* 424 U.S. at 40; FEC v. Central Long Island Tax Reform Immediately Comm., 612 F.2d 45, 52-53 (2d Cir. 1980)(*en banc*).

[51] Section 9012(f) is further underinclusive because it does not apply to independent expenditures on behalf of candidates who decline to accept, or are not eligible for, public financing. These candidates, who do not have access to public funds and must solicit contributions, would presumably have a greater incentive to circumvent the contribution limitations contained in FECA by encouraging contributions disguised as independent expenditures in exchange for special treatment.

Fund Act prevents presidential candidates who opt for public financing from accepting *any* contributions in the general election campaign. *See* 26 U.S.C. § 9003(b)(2). This prohibition is a more stringent safeguard than the contribution limitation upheld in *Buckley* and narrowly serves the identical function of preventing corrupt agreements or the appearance of corrupt agreements between contributors and presidential candidates.[52] Any expenditure made in consultation with a candidate or the candidate's campaign constitutes a contribution and is prohibited. *See* 2 U.S.C. § 441a(a)(7)(B)(i). Section 9012(f) is unrelated to the governmental interest in preventing potentially corrupt *quid pro quo* arrangements. In holding that a limitation on independent expenditures such as § 9012(f) is unconstitutional, the Court in *Buckley* correctly noted that "the value of public financing is not dependent on the existence of a generally applicable expenditure limit." *Id.* at 109.[53]

Section 9012(f) is not saved from constitutional infirmity because it limits independent expenditures by "political committees." So long as expenditures by political committees are not the result of prearrangement with the candidate or the candidate's campaign, there is no possibility that the expenditures are made in exchange for a promise of special favor.[54] Contrary to the view of

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[52] *See* Buckley, *supra*, 424 U.S. at 96; Republican Nat'l Comm. v. FEC, 487 F. Supp. 280, 285-86 (S.D.N.Y. 1980) (three-judge court), *aff'd*, 445 U.S. 955 (1980). Public funding also permits the candidate to concentrate on advocating his election before the public and relieves him from the time and effort otherwise devoted to fundraising. *See* 424 U.S. at 96; 487 F. Supp. at 284-85. Section 9012(f) does not further this governmental interest.

[53] *Accord*, S. Rep. No. 689, 93d Cong., 2d Sess. 18 (1974), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 114 (1977) ("*the need to control* [independent expenditures] *does not arise from public financing.*") (emphasis in original).

[54] Contrary to appellants' assertion, this Court has not found fault with "aggregated funds" as an improper influence on political decisions. The Court has held that unlimited independent expenditures by unions and corporations raise no problem of corruption or the appearance of corruption so long as the expenditures are

democracy espoused by Common Cause and the FEC, no problem of corruption is created when a political committee (or any person) earns some measure of loyalty from a candidate because it effectively advocates the candidate's election.[55] Any resulting loyalty constitutes no more than salutary responsiveness to a political constituency — the core of our system of representative government.[56]

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made from separate segregated funds. *See* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 414-18 (1972); United States v. Congress of Indus. Organizations, 335 U.S. 106, 123-24 (1948). The governmental interest underlying statutory authorization for the creation of separate segregated funds does not concern corruption of candidates, but rather ensures that the individual union member or shareholder retains "his freedom to refuse support," 407 U.S. at 415, so that the union or corporation is prevented from corruptly representing an exaggerated level of support based on involuntary or coerced contributions. *See* Bellotti, *supra,* 435 U.S. at 787, 792-95. *Bellotti* rejected the notion that political expression by aggregated funds is itself an evil that can be regulated under the First Amendment. Political associations are free to "aggregate large sums of money to promote effective advocacy." Buckley, *supra,* 424 U.S. at 22.

[55] Appellants' desire to limit independent expenditures because of their effect on the successful candidate is based solely on the content and effectiveness of the expression so limited. As this Court made clear in *Buckley,* when "the interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful,' " even the restrictive standard of *United States* v. *O'Brien* is not satisfied. 424 U.S. at 17 (quoting United States v. O'Brien, 391 U.S. 367, 382 (1968)); *see* Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819, 838, 614 P. 2d 742, 753, 167 Cal. Rptr. 84, 95 (1980) (Richardson, J., dissenting), *prob. juris. noted,* 49 U.S.L.W. 3616 (U.S. Feb. 24, 1981) (No. 80-737):

> The term "corrupt" implies the existence or expectation of a political *quid pro quo.* In addition, the term "corruption" subtly conveys the impression that there is a deviation from an objective standard. Such a belief can have no validity. In a democratic system objective "truth" is that which the majority subjectively chooses to adopt.

[56] *See* Eastern R. R. Presidents Conference v. Noerr Motor Freight Co., 365 U.S. 127, 137 (1961) ("In a representative

Attempts by citizen groups to persuade a candidate or officeholder that their views on public issues are correct enjoy the same First Amendment protection as attempts to persuade fellow citizens to embrace a particular candidate or political philosophy. In the case of the independent expenditures by political committees limited by § 9012(f), any influence[57] over either voter or candidate is the legitimate outcome of the democratic process.[58]

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democracy such as this, [all three] branches of government act on behalf of the people and, to a large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."); FEC v. AFC at 18a ("Individuals, by associating in political committees, can express viewpoints that complement the positions of the favored candidate, or, *they can express viewpoints which seek to influence or prod the candidate and the public.")* (emphasis added); V. O. Key, Jr., Politics, Parties and Pressure Groups 130 (5th ed. 1964); D. Truman, The Governmental Process 10-11, 46 (2d ed. 1971).

[57] *Bellotti* distinguishes the legitimate use of effective political expression by large corporations to influence political decisionmakers (*i.e.*, voters in referendum elections) from corrupt agreements to "buy" their votes. *See* 435 U.S. at 790 ("the fact that advocacy may persuade the electorate is hardly a reason to suppress it"); Let's Help Fla. v. McCrary, 621 F.2d 195, 200 (5th Cir. 1980); C & C Plywood Corp. v. Hanson, 583 F.2d 421, 425 (9th Cir. 1978); Schwartz v. Romnes, 495 F.2d 844, 851 (2d Cir. 1974) (emphasis added):

> Corporate funds *paid to a candidate* or political party have the potential of creating debts that must be paid in the form of special interest legislation or administrative action. In contrast, when the issue is one to be resolved by the public electorate monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor the corporate contributor's special interest.

[58] The court below recognized that, in the absence of a *quid pro quo* arrangement, a "candidate will no more be beholden to the political committees than Presidents typically are to those elements of their constituency who voted for them." FEC v. AFC at 20a. "This public comment," the court held, "may persuade, and thereby influence decisionmakers, but it is protected by the First Amendment." *Id.; accord,* United States v. Congress of Indus. Organizations, 335 U.S. 106, 144-45 (1948) (Rutledge, J., concurring) (" '[U]ndue influence' in this connection may represent no more than convincing weight of argument fully presented, which is

Buckley plainly states that the constitutional guarantee of free political expression:

> denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution, it is not the government, but the people — individually as citizens and candidates and *collectively as associations and political committees* — who must retain control over the quantity and range of debate on public issues in a political campaign.

424 U.S. at 57 (emphasis added).

3. Alternative measures less restrictive of First Amendment rights fully serve the governmental interest in stemming corruption or the appearance of corruption.

In *Buckley*, this Court held that a limitation on independent expenditures such as § 9012(f) is unnecessary to prevent the reality or appearance of corruption because alternative measures less restrictive of First Amendment rights fully serve that governmental interest. *Id.* at 55. *Buckley* recognized that even without limitations on independent expenditures, FECA and the Fund Act contain a comprehensive set of (1) prohibitions and limitations on contributions, (2) regulation of "coordinated" expenditures, and (3) disclosure requirements that serve to prevent the opportunity for corrupt *quid pro quo* arrangements. Under this existing statutory framework, an additional limitation on independent expenditures is unconstitutional because " '[i]n the area of First Amendment freedoms, government has the duty to confine itself to *the least* intrusive regulations which are adequate for the purpose.' " *Id.* at 238 (opinion of Burger, C.J.) (quoting *Lamont, supra,* 381 U.S. at 310 (Brennan, J., concurring)).[59]

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the very thing the Amendment and the electoral process it protects were intended to bring out.")

[59] *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."); Note, *Less Drastic Means and the First Amendment,* 78 Yale L. J. 464 (1969).

Under the Fund Act, all contributions to presidential candidates who accept public financing are prohibited. As *Buckley* noted with respect to the analogous contribution limitations contained in FECA, "[t]here is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions." 424 U.S. at 56. Contribution limitations, "along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions." *Id.* at 58.

FECA also limits the size of contributions to a political committee such as AFC. Contributions to a political committee of more than $5,000 in any calendar year are prohibited, even in a publicly funded presidential campaign. *See* 2 U.S.C. § 441a(a)(1)(C). As the Court concluded in *California Medical Association,* this safeguard constitutes a significantly less intrusive restriction on First Amendment rights than an independent expenditure limit, since it permits a political committee to aggregate limited contributions from an unrestricted number of persons in order to undertake political advocacy. *See* 49 U.S.L.W. at 4846 (plurality opinion of Marshall, J.); *id.* at 4848 (Blackmun, J., concurring in judgment).

Another provision of FECA, § 441a(a)(7)(B)(i), prevents circumvention of the contribution limits and constitutes the alternative measure least restrictive of First Amendment rights. *See* 2 U.S.C. § 441a(a)(7)(B)(i). Under § 441a(a)(7)(B)(i), a "contribution" is defined to include "expenditures made by any person in cooperation, consultation, or concert with, or at the request or

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Appellant's reliance on *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973), is misplaced. Restrictions on the partisan political activity of government employees are permissible under the First Amendment only because government as an employer has a compelling interest in ensuring the integrity of its workforce. The government cannot, consistent with the First Amendment, impose such restrictions on individuals or groups who have not entered an employment relationship with government. *Id.* at 564.

suggestion of, a candidate." *Id.* Such a "coordinated" expenditure is prohibited if a presidential candidate accepts public financing.[60] The FEC retains broad authority to investigate charges that political committee expenditures result from prearrangement with a candidate and to seek civil and criminal penalties for violations of the Fund Act's prohibition on contributions to presidential candidates.[61] *Buckley* held that regulation of coordinated expenditures, rather than limitations on independent expenditures, is the proper vehicle to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." 424 U.S. at 47.[62]

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[60] *See* Republican Nat'l Comm. v. FEC, 487 F. Supp 280, 288-89 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980) ("any expenditure made in 'coordination' with a candidate's campaign must be treated as a 'contribution' to the candidate under 2 U.S.C. § 441a(a)(7) and would be illegal in the case of a candidate who opted for public funding under the Fund Act.")

[61] *See* 2 U.S.C. § 437g. The FEC has commenced an administrative enforcement action following charges by Common Cause and the Carter-Mondale Re-Election Committee that appellees' expenditures were coordinated with the Reagan campaign. All of AFC's expenditures were made independently of the Reagan campaign. AFC made no contributions to the Reagan campaign in either the primary or general election. In this case, appellants concede that AFC made only independent expenditures. *See* Jurisdictional Statement, Common Cause v. Schmitt, at 6 n.7. Despite its concession, Common Cause's brief sets forth a litany of unsubstantiated charges that AFC's expenditures were actually disguised contributions. *See* Brief of Appellant Common Cause, at 6-10, 31-32.

[62] *See* FEC v. AFC at 13a n.29 ("Pivotal to the Court's analysis of electoral integrity *vis a vis* independent expenditures was the statutory provision that 'controlled or coordinated expenditures are treated as contributions rather than expenditures.' ") (quoting Buckley, *supra*, 424 U.S. at 46). After *Buckley* invalidated FECA's limitation on independent expenditures, Congress amended the Act in 1976 in an effort to close even more securely any loophole that might exist for coordinated expenditures. *See, e.g.*, H.R. Rep. No. 917, 94th Cong., 2d Sess. 6 (1974), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 806 (1977):

> [T]he bill treats expenditures made in cooperation, consultation, or concert with or at the request or suggestion of a can-

FECA's extensive reporting and disclosure requirements guarantee that all contributions and independent expenditures by political committees are subjected to full public scrutiny. A political committee such as AFC must register with the FEC and keep detailed records of "both contributions and expenditures." *Id.* at 63; *see* 2 U.S.C. §§ 433-34. Such "[e]xtensive reporting, auditing, and disclosure requirements . . . facilitate the detection" of corrupt agreements. *Buckley, supra,* 424 U.S. at 56.[63]

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didate as a contribution in kind to that candidate and provides further that the republication of a candidate's campaign materials shall be regarded as a contribution. This provision is designed to draw a line between "independent expenditures" protected by the First Amendment because they are an expression of an individual's views, and expenditures which are disguised contributions to a candidate.

Accord, 122 Cong. Rec. 12203 (1976) (remarks of Rep. Brademas); *id.* at 8882 (remarks of Rep. Gaydos).

[63] The three-judge court did not err in holding § 9012(f) unconstitutional without permitting the additional discovery sought by Common Cause. Since appellees clearly have standing to raise the constitutional issue and there is no question as to the manner in which § 9012(f) applies to their conduct, the court was free to make a determination that § 9012(f) was facially invalid without development of the facts Common Cause now seeks to discover. *See* California Medical Ass'n, *supra,* 49 U.S.L.W. at 4845 n.14 (plurality opinion of Marshall, J.) In *Village of Schaumburg* v. *Citizens for a Better Environment,* 100 S. Ct. 826 (1980), this Court held an ordinance prohibiting solicitation of contributions by certain charitable organizations invalid on its face. The Village had sought an opportunity to prove that the characteristics of the group involved supported the validity of the provision. The court of appeals held that such issues of fact were immaterial to a consideration of facial validity. *Id.* at 831. This Court concluded that the court of appeals was "free to inquire whether [the ordinance] was overbroad, a question of law that involved no dispute about the characteristics of [the group]." *Id.* at 835. The facts Common Cause now seeks to discover would be equally immaterial to this Court's consideration of the constitutionality of § 9012(f) on its face. *See* Brief of Appellant Common Cause, at 43.

In dismissing Count II of Common Cause's complaint for lack of subject matter jurisdiction the three-judge court stated "[i]t would be incongruous and cumbersome for a three-judge district

CONCLUSION

For the foregoing reasons, the First Amendment right of political committees, such as AFC, to make independent expenditures for communications supporting publicly funded presidential candidates must be preserved inviolate. *See id.* at 58-59; *California Medical Association, supra,* 49 U.S.L.W. at 4846 (plurality opinion of Marshall, J.). Appellees AFC, Schmitt and Curtis respectfully pray that the judgment below be affirmed.

Respectfully submitted,

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court, ordered by Congress to expedite its consideration, to supervise extensive discovery and receive detailed factual evidence." FEC v. AFC at 26a. It noted that such discovery was relevant only to "a determination of *compliance* with the election laws" and not to consideration of the constitutionality of the Act. *Id.* (emphasis in original). Common Cause is attempting to remand for discovery of facts that are unrelated to the purpose for which it originally sought discovery. During oral argument before the district court, Common Cause stated that it needed discovery to establish its proposition in Count II that appellees' expenditures were conducted sufficiently in concert with the Reagan campaign to constitute coordinated expenditures. *See* Transcript of Oral Argument, at R. 86A, 18-19 (July 8, 1980).

APPENDIX A

Don't give up on turning this country around.

THE CARTER RECORD

GIVING UP ON THE BUDGET

When Carter took office, America had a national debt of $709.1 billion. Four years later, we're $1.01 trillion behind in our bills, an increase of 42%, and still adding.

GIVING UP ON INFLATION

In 1976, Carter promised to reduce inflation from 4.8% to 4.0% by 1980. Instead, Carter allowed inflation to rise to 6.8% in his first year, 9.0% in his next year, 13.3% by the end of 1979 and to 18.2% in the first quarter of this year.

THE REAGAN RECORD

TURNING THINGS AROUND

Before Reagan, California had a public debt of $197 million and was going broke to the tune of $1 million a day. At the end of his term, Reagan had the state $554 million in the black.

TURNING THINGS AROUND

Reagan beat inflation in California, where the rate had been higher than the national average prior to his taking office. Reagan held inflation to the national average for two years and then brought it under the U.S. average his last six years.

GIVING UP ON JOBS

Carter promised to reduce unemployment to 4 - 4½% by the end of his term. We now have 7.8% unemployment, with 8.2 million people out of work. That figure is expected to mushroom to a shameful 9%.

TURNING THINGS AROUND

As governor of California, Reagan implemented ingenious ways to put even the hard core unemployed to work. He developed programs to train and employ more than 75,000 minority youths and chronic unemployed. The same kind of thing can be done for America, and he's the man to do it.

GIVING UP ON LOWER TAXES

Already, Carter has hit the American worker with the largest single tax increase in history. The feds now swallow up 1/5 of the average citizen's income. And Carter's load of new taxes will mean increased taxes of about $200 billion a year for the next decade.

TURNING THINGS AROUND

During his 8-year term as governor of California, our most populous state, Reagan returned $5.7 billion in tax relief to the people where it belonged. For the nation, Reagan has already said he will cut your income taxes. And he's proved he knows how to do it.

If you give up now, you'll be giving more later. With four more years of Jimmy Carter, you'll have less of what you want, and more of what you don't want. Less productivity. Less efficiency. Less leadership. More taxes. More inflation. More unemployment. Carter's record doesn't just speak for itself. It shouts.

You can help turn this country around by voting for Ronald Reagan and George Bush, the men who will give America the changes we all know are possible.

With a contribution of time or money to Americans for Change, sponsors of the "Reagan for President in '80" advertising campaign, you'll help spread the word for the change American needs. Right now.

Reagan for President in '80

1a

Paid for by

Americans for Change

Senator Harrison Schmitt (R. - N.M.) Chairman

218 North Lee Street, Suite 319, Alexandria, Virginia 22314. Phone 703-683-5221.

APPENDIX B

AMERICANS FOR CHANGE — RADIO SPOTS

I. FEELING GOOD

Narrator: Four years ago today we were feeling good about America. Inflation was easing. The economy was strong. The world was at peace and we had every reason to be optimistic about the future. Then we elected Jimmy Carter president. Since then, inflation has gotten worse. The economy has turned sour. The world has become more dangerous. Our optimism has been replaced with pessimism and a feeling of helplessness. We don't blame everything that has happened in those four years on Jimmy Carter, but we remember what Harry Truman once said, "The buck stops here." Well, no matter how they pass the buck, we believe it leads to one painful fact — Jimmy Carter can't run this country. We've got to change the direction America is going in and the only way to do that is to elect Ronald Reagan and George Bush. They will give us back the America that Jimmy Carter took away.

This announcement was not authorized by any candidate. It was paid for by Americans for Change, Senator Harrison Schmitt, Chairman.

II. 1976 NEWSPAPER

Person 1: Well thank you President Carter. You really hit us where we live — right at home plate.

Person 2: What are you carrying on about?

Person 1: I found this 1976 newspaper when I was cleaning out the closet. Will you look at the price of this house the year Carter was elected?

Person 2: Hmm? That same house costs twice as much today. Back then we could have bought it.

Person 1: Right now we can't afford it with our two salaries combined.

Person 2: Look at that interest rate 8 1/2%. This spring it almost doubled that.

Person 1: Would you tell me why we voted for Carter in the first place? We had it so good before he came along.

Person 2: Well, we are going to change things this time honey — with Reagan.

Narrator: At today's interest rates, 90% of the people in America cannot afford to buy a home. It doesn't have to be that way. Vote for Ronald Reagan and George Bush — the men who will give us the changes we all know are possible.

This announcement not authorized by any candidate. It was paid for by Americans for Change, Senator Harrison Schmitt, Chairman.

III. INFLATION AND TAXES

Person 1: Taxi! Say, I've been out of the country. Have we had the Presidential debates yet?

Person 2: Well, Reagan and Anderson debated.

Person 1: What about Carter?

Person 2: Are you kidding? Debate with his record? In '76 Carter promised to get inflation down to 4%. This year it hit 18% at full gallup.

Person 1: Guess he gave up on inflation.

Person 2: Well, Reagan wouldn't. He beat inflation in California. He took them from above to below the national average and kept them there.

Person 1: Turned things around, huh?

Person 2: And did the same things for taxes. Reagan returned 5.7 billion in tax relief to the people — where it belonged.

Person 1: No kidding?

Person 2: Yeh. But not Carter. He gave us the biggest tax increase in history. The feds now gobble up — get this — one-fifth of our paycheck.

Person 1: Maybe Reagan is the man to turn the country around.

Person 2: Oh, I don't think there is any debate about that.

Narrator: Vote for Ronald Reagan and George Bush — the men who will give us the changes we all know are possible.

Paid for by Americans for Change, Senator Harrison Schmitt, Chairman. Not authorized by any candidate.

APPENDIX C

Americans for Change

sponsors of REAGAN FOR PRESIDENT IN '80
218 North Lee Street, Suite 319, Alexandria, Virginia 22314
(703) 683-5221

Executive Committee

Harrison (Jack) Schmitt, *Chairman*
U.S. Senator, New Mexico

John L. Harmer, *Co-Chairman*
Former Lt. Governor, California

Dave Durenberger, *Co-Chairman*
U.S. Senator, Minnesota

Carl T. Curtis, *Treasurer*
U.S. Senator, Nebraska (Ret.)

Brad O'Leary, *Vice-Chairman*
Executive Director of Reagan for President in '80

Howard Ruff, *Co-Finance Chairman*
Chairman, Target, Inc.

October 9, 1980

Dear National Steering Committee Member:

I have enclosed a cassette tape of several Reagan/Bush radio spots dealing with the economy. Our committee will run these commercials in swing states.

I want to tell you how critical a period we are entering with the election only four weeks away. Your support at this time could make the difference.

I need to ask for your help in raising funds for advertising on TV, radio and in newspapers. Can I count on your assistance?

In particular, I hope you will consider sending out one of the enclosed letters to friends in your area which you know can help.

I have asked one of my staff members to call you and see which letter you might use and how many tapes we can send you.

Please respond today — the timing is crucial.

Sincerely,

/s/ Harrison (Jack) Schmitt
HARRISON (JACK) SCHMITT
U.S. Senator, New Mexico

Authorized and paid for by AMERICANS FOR CHANGE, an independent committee not authorized by any candidate.

APPENDIX D

HARRISON (JACK) SCHMITT
UNITED STATES SENATOR
NEW MEXICO
AUGUST 21, 1980

Dear Fellow American,

I was privileged, eight years ago, to be part of an American Astronaut team that landed on the moon. The members of that team raised the American Flag during that final trip. Today the Stars and Stripes is still the only flag that has ever flown on the surface of the moon.

I hope you also remember that in that same year Ronald Reagan was completing his second successful term as Governor of our country's largest state, California.

I clearly remember that this was a time when Americans were proud of their Flag and country. I remember it as a time when we believed that creativity, determination and our work ethic would allow Americans to overcome any obstacle.

I must ask you to reflect a minute on just *what has happened to our country*? Do we no longer have leaders in our government capable of achieving solutions to our problems? Solutions that eight years ago we were clearly able to achieve. Have we lost our ability to achieve greatness? Is there no hope for the future?

I share your sense of frustration as we see a deepening recession causing layoffs and entire plants to close as unemployment reaches almost 8%. Your ability to save and plan for the future is being subverted by double digit inflation Carter refuses to control.

You and I read daily about our allies who treat the Carter administration with public condescension and private contempt. Our enemies act as if America is a second rate power that can be blackmailed by any petty dictator that desires.

I have heard with my own ears Carter stating that the problems of America are too complicated for him and his advisors to solve.

Jimmy Carter has clearly demonstrated that he is a hopelessly inept and indecisive President who is content to be manipulated by

domestic inflation and recession and by any petty despot who seeks to humble America.

I believe our country is still the greatest nation on the face of the earth. You and I as American citizens can hope and dream of a better tomorrow. We know such a tomorrow is achievable.

I am willing to work and dream of a better future and I know you share my feelings. But we need to be led by men and women who can inspire this country to unleash the competitive drive that tamed our frontiers.

As Governor of California, Ronald Reagan was able to attract just such high calibre men and women to serve in state government. I want you to know they were men and women who helped lead the state of California into eight years of prosperity, low unemployment and inflation that never topped 3%.

I believe Ronald Reagan and the American leaders he will bring to Washington will make positive contributions for a better America. A Reagan administration can better deal with the problems of faltering industry, inflation, too little energy development, pollution, crime, inadequate national defense and a frustrating sense that America has lost its will to lead the forces of freedom in a dangerous and volatile world.

I invite you to join me as a member our independent committee whose goal is to send Ronald Reagan to Washington as the next President of the United States, so Americans can once again feel a sense of pride in their flag and their country.

The federal law prohibits Ronald Reagan from accepting a financial contribution from you for the general election. The law also limits the amount of money Reagan can spend on voter educational material for your friends and neighbors. You, however, may make an independent contribution for this material and distribute it on behalf of Governor Reagan. Will you help?

I know you understand that the federal election law gives a tremendous advantage to an incumbent President who is willing to use almost unlimited government funds, government employees and government resources to promote his candidacy.

I urge you to become a Reagan Independent Voter Chairman and accept the responsibility of identifying 10 Reagan voters in your community and urging them to vote on Nobember 4, 1980.

Only if you agree to serve can we be guaranteed a fair and balanced election. I am afraid that without your participation Carter will use the incumbency for an unfair advantage that Reagan may not be able to overcome.

If you agree to serve as a Reagan Independent Voter Chairman, you will receive an election kit with detailed information on how you can help.

Your kit will contain Reagan buttons, bumper strips and window signs that can also be used as yard signs. You will also receive brochures on the five issues of greatest concern to Americans today.

I will also send you detailed instructions on how to go about recruiting 10 of your friends and neighbors to make a commitment to support Governor Reagan.

Your kit will include membership identification as a Reagan Independent Voter Chairman and 10 electiongrams to mail to your friends the Sunday before the election.

I believe you must help if we are to elect a President who will show strong leadership, strength of character, and a man we can be proud of as he serves us and as he solves the problems confronting America. That man is Ronald Reagan.

You must become involved if Reagan is to become President.

I hope you will help by sending a contribution of at least $19.80 which will cover the cost of the Reagan Independent Voter Kit. Any additional funds you wish to contribute will allow us to distribute kits to Reagan supporters who cannot afford to make a contribution.

I want you to understand that the election in your state could be decided by just one vote per precinct. Your commitment to help could make the difference in this election.

May I count on you for a commitment to Governor Reagan and the future of our Country. . . .

Sincerely,

/s/ Harrison Schmitt

HARRISON "JACK" SCHMITT

U. S. Senator, New Mexico

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